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BJM legal column – June 2017

Andrew Symon

Damages for ‘nervous shock’ at a birth

A recent court case heard a claim by a baby’s mother and grandmother for damages relating to ‘nervous shock’ following a birth complicated by dystocia (RE and others v Calderdale 2017). To claim such damages, an injury must have been directly caused by a traumatic incident that occurred because of someone else’s negligence. To succeed, the claimants had to establish that the midwives and / or medical staff had been negligent during the birth of a baby who suffered a significant hypoxic ischaemic insult.

The case was hugely complicated by a series of mishaps and errors relating to the clinical case records. In the first place, the defendant NHS Trust destroyed the original records after the legal claim had been raised. Digital copies had been made, but these proved less than ideal:

“The integrity of the records cannot be guaranteed. The photocopies, some of which are in colour and some in monochrome, are not of good quality for forensic purposes and there are puzzling differences between some of the copies of the original documents and the digitised version” (per Goss J at 4).

This failure to maintain records led the judge to agree to the claimants’ assertion that wherever there were ambiguities or uncertainties in the documents, the court ought to resolve them in the claimants’ favour. This point was not challenged by the defendant’s lawyer.

Further difficulties with the available documents included the defendant Trust’s own internal report, which the judge said, revealed “puzzling and largely unexplained inconsistencies, particularly in relation to timings and events” (per Goss J at 15). The judge went on:

“There is no doubt that the various medical notes contain unexplained and contradictory entries and there are other documents attributable to witnesses with material that contradicts some of those entries” (per Goss J at 22).

Having assessed all the contradictory evidence, the judge concluded that the midwife’s care had indeed been negligent, and that the claimants were entitled to receive compensation with regard to the baby’s injuries. Having established this, the court was then asked to consider whether the baby’s mother and grandmother were entitled to compensation for the nervous shock they claimed to have suffered because of these events. Post-Traumatic Stress Disorder (PTSD) is a valid legal claim, and there are two categories for such claims: primary and secondary.

A primary victim is one who suffers a recognised psychiatric illness after being directly involved in the incident in question, although (s)he is not physically injured. Secondary victims are those whose psychiatric injury results from witnessing the death or injury of others; there are additional requirements to establish this, making it harder to secure compensation (Leverick 2007). This legal distinction stems from the ruling given in the Hillsborough disaster, in which 96 football fans died (*Alcock v Chief Constable of South Yorkshire* 1992). Some of those who witnessed the tragedy claimed to have suffered ‘nervous shock’ as a result.

The mother claimed to be a primary victim because at the time the negligence occurred she and her baby were not separate legal entities. In the UK, a baby is not considered a ‘legal person’ until fully expelled from the uterus. The baby’s mother claimed that as the hypoxia began before the birth was complete, she should be treated as a primary victim. Did she have good cause to make such a claim?

During the second stage of labour she had been on all fours on the floor. The contradictory clinical notes notwithstanding, it was established that after the baby’s

face had been delivered as far as the chin the claimant was asked to move to the bed. According to the defendant's psychiatric expert, the mother...

"... was very worried and frightened at this point, that the baby was in some danger and that she might break the baby's neck as the baby's body was still stuck in the birth canal."

The mother managed to get onto the bed, remaining on all fours, and the chin was successfully delivered. The shoulders followed, but the body became stuck around the nipple line. The psychiatric expert noted:

"...by squatting on all fours she could see the baby's face. This alarmed her..."

An obstetric registrar had been called, but was asked to wait outside as the midwife thought she could manage; when he came in a minute later he helped to effect the birth of the rest of the body. The baby was born "flat and apnoeic, with a purple and swollen head. The (mother), justifiably, thought she was dead" (per Goss J at 42). The judge cited the mother's own account:

"I couldn't believe what was happening. I felt that I was living in a nightmare... as I looked down at her I could see that her body was completely white and lifeless... I remember thinking to myself "my baby is dead my baby is dead"... I had stuck in my mind the picture of her lying between my legs, her head was completely purple and bruised and swollen, her body was white and lifeless."

The mother's own psychiatric expert averred that:

"The most striking early responses to these events were those of shock. She described feeling as though she was in a bubble, as though it was unreal and not happening to her and described feelings of dissociation. She was physically shaking and cold."

In these circumstances, the judge accepted that the mother's PTSD was triggered by the birth of an apnoeic baby which itself was a consequence of the defendant's negligence. In addition, she was a primary victim:

"The negligence occurred when RE's head had crowned but her body remained in the birth canal. At this point she was not a separate legal entity from her mother and, in law, they are to be treated as one... this was an outwardly shocking experience that was exceptional in nature and horrifying as judged by objective standards and by reference to persons of ordinary susceptibility. It was not an event of the kind to be expected as 'part and parcel' of the demands and experience of childbirth. [The mother]... is entitled to damages for nervous shock." (per Goss J at 40, 47)

The grandmother, likewise, was convinced that the baby was dead, and the judge concluded that she, too, was entitled to compensation, although she was considered to be a secondary victim.

This was an unusual claim in some ways. Sadly familiar (see Symon 2016) were the failures in documentation which - once again - did nothing to help the defendant's case. That this is such a repeated experience is both disconcerting and saddening.

This traumatic event has had several unfortunate consequences. While the baby, having suffered significant hypoxia, was most directly affected in a physical sense, practitioners should be aware that other forms of trauma can also be the subject of a legal claim. Good holistic clinical care requires midwives to see the whole woman. It took nearly six years from the time of the birth to this case being heard in court. It is to be hoped that this mother has received and will continue to receive sensitive and effective follow-up after these tragic events, particularly in the event of further pregnancies.

Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310 [also White v Chief Constable of South Yorkshire [1999] 2 AC 455]

Leverick F (2007) Counting the Ways of Becoming a Primary Victim: Anderson v Christian Salvesen Plc. *Edinburgh Law Review*, 11: 258-264

RE and others v Calderdale and Huddersfield NHS Foundation Trust [2017] EWHC 824 (QB)

Symon A (2016) Plus ça change... Problems with memory, and the importance of documentation (again). *British Journal of Midwifery*, 24 (3): 222-223